



MITT ROMNEY
GOVERNOR

KERRY HEALEY
LT. GOVERNOR

ROBERT C. HAAS
SECRETARY

The Commonwealth of Massachusetts
Executive Office of Public Safety
Fire Safety Commission

Automatic Sprinkler Appeals Board

P.O. Box 1025 ~ State Road
Stow, Massachusetts 01775
(978) 567-3181 Fax: (978) 567-3121

MAURICE M. PILETTE
CHAIRMAN

PAUL DONGA
VICE CHAIR

Docket # 2005-177
474 Moody Street
Waltham, MA.

AUTOMATIC SPRINKLER APPEALS BOARD
DECISION AND ORDER

A) Statutory and Regulatory Framework

This is an administrative proceeding held in accordance with Massachusetts General Laws Chapter 30A; Chapter 148, section 26G½ and Chapter 6, section 201, relative to a determination by the Waltham Fire Department, requiring the installation of an adequate system of automatic sprinklers in a building owned by Robert Francis, agent of the JRM Realty trust (hereinafter referred to as the Appellant). The building, which is the subject of the order, is located at 474 Moody Street, Waltham, MA.

B) Procedural History

By written notice dated December 6, 2005, the Waltham Fire Department issued an Order of Notice to the Appellant informing him about the provisions of a new law, M.G.L c. 148, s.26G½, which requires the installation of an adequate system of automatic sprinklers in certain buildings or structures. The building subject to the order is located at 474 Moody Street, Waltham, MA. The Appellant filed an appeal of said order on December 27, 2005. The Board held a hearing relative to this appeal on July 12, 2006, at the Department of Fire Services, Stow, Massachusetts.

Appearing on behalf of the Appellant was Attorney Robert Mann, Robert W. Francis (R.W. Francis Co., agent for JRM Trust), and Nathan Sigel, President, of "Tempo". Appearing on behalf of the Waltham Fire Department was Attorney Luke Stanton, Fire Chief Richard Cardillo, and John Millian, Waltham Building Inspector.

Present for the Board were: Maurice M. Pilette, Chairperson; Stephen D. Coan, State Fire Marshal; Alexander MacLeod and Peter E. Gibbons. Peter A. Senopoulos, Esquire, was the Legal Counsel for the Board.

C) Issue(s) to be Decided

Whether the Board should affirm, reverse or modify the enforcement action of the Waltham Fire Department relative to the subject building in accordance with the provisions of M.G.L. c.148, s. 26G½?

D) Evidence Received

1. Application for Appeal filed by Appellant
2. Statement of Reasons for Relief by Appellant
3. Order of Waltham Fire Department
4. Temporary Certificate of Inspection issued 12/1/2005
5. Capacity Calculations / Drawing of Facility
6. Photographs of Facility
7. Notice of Pre-Hearing Status Conference to Appellant
8. Notice of Pre-Hearing Status Conference to Waltham Fire Dept.
9. Notice of Hearing to Appellant
10. Notice of Hearing to Waltham Fire Dept.
11. Appellant's Submission (Items 1-13)
12. Liquor License
13. Restaurant Advertisement
14. Appellant's Trial Brief

E) Subsidiary Findings of Fact

- 1) By notice dated December 6, 2005 and received on December 8, 2006, the Waltham Fire Department issued an Order to the Appellant requiring the installation of an adequate system of automatic sprinklers in a building located at 474 Moody Street, Waltham, in accordance with the provisions of M.G.L. c. 148, s.26G1/2. This building is leased by an establishment that operates under the name of "Tempo", a private, for profit business. The Appellant indicated that the interests of both the business owner/operator and the building owner were represented at the hearing.
- 2) According to a new Certificate of Inspection issued on June 27, 2006, the City of Waltham Building Department indicated that the business location has a maximum allowable occupancy load of 160 persons and is currently classified as a use group classification of A-3. The owner and operator of the establishment indicated that the business provides seating for 106 persons in the dining area and 17 seats in the bar/lounge area. Based upon the legal capacity combined with the stated seating capacity, an additional 37 persons would be legally allowed into the business as standees. The Appellant indicated that the dining area and bar area are separated by a "half wall" that provides a physical separation between the two areas. However, the Certificate of Inspection does not list a separate occupancy load for either of these two areas. It appears that patrons may congregate in either area during most hours of operation.
- 3) The Appellant contends that the establishment is principally a restaurant and is therefore exempt from the sprinkler provisions of M.G.L. c.148, s.26G½. He testified that the percentage of

- business revenue is approximately 62 % food and the remaining portion (38%) is from the sale of alcohol. Appellant provided testimony that customers routinely call the establishment to inquire about the planned musical entertainment in addition to questions about the food.
- 4) The establishment serves full meals on a daily basis. The facility has a full service bar, which is also used for restaurant seating. The Appellant stated that there is no prolonged period of time that the bar is open without service of food. However, there was testimony indicating that customers may purchase alcohol only.
 - 5) The establishment has been issued an entertainment license that allows it to feature “live bands Monday thru Saturday...between the hours of 7:00 PM to 12:30 P.M.”. The parties indicated that the 12:30 P.M. time is incorrect and should be 12:30 A.M. The facility features live musical entertainment approximately 2-3 times a week beginning around 10:00 P.M.. The entertainment typically consists of a 2 or 3 piece band, which sets up in the front portion of the establishment. During such performances, tables and chairs are removed to allow room for the band. There is currently no stage, raised platform, dance floor or special lighting in the facility. Appellant indicates that the music is provided for the entertainment of patrons, many of whom are dining.
 - 6) Appellant indicated that the live musical entertainment is diverse and includes: Rock, Jazz, Country, Rhythm and Blues and Latin. He indicated that the bands eliminated using drums since the noise level of a drum is too loud. In general, if a musical group is too loud, appellant does not allow them to perform again. The Appellant testified that there is no cover charge or separate fee for the entertainment. Appellant indicated that the establishment does not allow more than 80 persons to congregate in the “bar area”. However, such a restriction on capacity is self-imposed as such limit is not stated on the current Certificate of Inspection.
 - 7) Full meals are available in the “bar” area in addition to the dining area. The restaurant remains open until 1 a.m., with the last seating for dinner at approximately 11:15 P.M. “Last call” is at approximately 12:50 A.M. The establishment holds a full liquor license, which allows “All kinds of liquor” to be drunk on the premises. Liquor may be legally sold on weekdays until 1 a.m. and on Sundays until 12:00 A.M. (note that the license actually states that they can sell liquor until 1:00 pm however it was acknowledged by the parties that this is a typographical error and that the time should be 1:00 AM). A customer may enter the premises for the purpose of ordering an alcoholic beverage and to listen and watch the musical entertainment without ordering food. Occasionally people will stand up and watch the entertainment. However, there is no designated area for standing.
 - 8) In his testimony, the Appellant indicated that the facility is rented out for functions on a limited basis approximately 3 to 4 times a year. A meal is the main attraction for such events.
 - 9) The Appellant provided a copy of a lease agreement which contains language that the facility may only be used a restaurant in conjunction with a bar/lounge, and not exclusively as a bar or lounge.
 - 10) The appellant stated that the cost of installing a sprinkler system would pose a financial hardship on the facility and that it would be difficult to complete the work within the timeframe of the law. The Appellant referred to cost estimates which reflects a cost of \$42,000 for installation with an additional cost of \$11,750. for a new water line to accommodate the sprinkler system. He indicated that this cost did not include the price of alarm boxes, electrical work and related

renovation work which could cost an additional \$10,000. The owner indicated that he had difficulties in obtaining quotes and that several installers indicated that they could not begin the work until next year.

- 11) The representatives for the Fire Department stated that the Order to install a sprinkler system was based upon the overall building capacity, the existence of liquor sales, a bar area, routine musical entertainment and the potential for high occupant load and impeded egress. They indicated that the establishment combines bar, restaurant and entertainment features and that there is no separate occupancy capacity for the dining and bar areas. They testified that the establishment is not merely a restaurant since it routinely provides musical entertainment for its patrons who may or may not attend the establishment for dining purposes. They submitted a copy of an advertisement of the facility stating that “In dining, as in music, Tempo is everything”. The advertisement also stated that Tempo provides entertainment Thursday, Friday and Saturday nights. Such evidence was submitted to support their contention that the business conducts activities beyond mere dining.
- 12) There was testimony that, during the process of renovating the building, Fire Department personnel informed the business owner that sprinklers will probably be required in the facility if the proposed legislation became law. Appellant acknowledged the conversation, but indicated that he believed the facility would be exempt as being a restaurant.
- 13) In addition, the Waltham Fire Department expressed concern over patrons standing in the bar area during the presence of live entertainment. The combination of patrons standing in that area, along with alcohol and live entertainment, in the opinion of the fire department, could present a dangerous situation if an emergency were to occur requiring emergency evacuation. The Department also provided testimony indicating that there are portions of the establishment, when filled to capacity with standees, would create a high occupant load density situation of only 3 square feet (s.f.) per person, particularly when the band is set-up and playing thus taking up additional space. Appellant provided documentation indicating that the areas in question would have a load density of 5 s.f. per person.

F) Ultimate Findings of Fact and Conclusions of Law

- 1) The provisions of the 2nd paragraph of M.G.L. c. 148, s. 26G1/2, in pertinent part states: “ every building or structure, or portions thereof, of public assembly with a capacity of 100 persons or more, that is designed or used for occupancy as a night club, dance hall, discotheque, bar, **or for similar entertainment purposes...** (emphasis added), (a) which is existing or (b) for which an approved building permit was issued before December 1, 2004, shall be protected throughout with an adequate system of automatic sprinklers in accordance with the state building code”. The law was effective as of November 15, 2004.
- 2) The statutory timeline for said sprinkler installation in accordance with the provisions of section 11, St. 2004, c.304, requires the submission of plans and specifications for the installation of sprinklers within 18 months of the effective date of the act (by May 15, 2006) and complete installation within 3 years of the effective date of the act (by November 15, 2007).
- 3) This facility is classified as an A-3 use group which is typical of a restaurant for building code purposes. The law specifically does not apply to a place of assembly within a building, structure

or portions thereof used principally as a “restaurant”. Although, the classification of this establishment as A-3 is significant, it is not necessarily conclusive. The Board in determining the applicability of s. 26G1/2 will review the characteristics of the establishment as a whole. In a memorandum dated 1-10-05, this Board issued an interpretive guidance document relative to the provisions of this new law, c.148, s.26G1/2. The law was a portion of a comprehensive legislative initiative undertaken as the result of a tragic Rhode Island nightclub fire, which took place in February 2003. In said memorandum the Board acknowledged the existence of establishments that may feature characteristics of both a restaurant and a bar or nightclub. In determining whether or not such “combination” establishments are subject to the provisions of M.G.L. c.26G1/2 this Board indicated that it would look at common sense factors such as:

- a) Does the restaurant establishment regularly and routinely serve meals on a daily basis?
- b) Does the establishment provide a bar, bar seating, bar standing and a bartender for the purposes of serving alcoholic beverages directly to alcohol consuming customers?
- c) Does the bar and bar seating area have the ability to expand into the dining area to accommodate special entertainment activities or increased capacity/density.
- d) If the establishment provides a bar and bar seating, are alcoholic beverages continuously served to customers more than one hour after full kitchen facilities have been closed?
- e) Is live or recorded music provided for dancing purposes or for a viewing audience? (does not include background dinner music)?
- f) Does the establishment provide special entertainment, including but not limited to: musical, theatrical, comedy, or sport viewing activities?
- g) Based upon the establishment’s name, décor, atmosphere, does a customer expect a bar or nightclub type establishment?
- h) Is the establishment or portions thereof routinely or regularly used for private or public functions for dancing, parties, celebrations, entertainment or performance purposes?
- i) Does the establishment have an entertainment license?

The Board indicated that these factors were not necessarily all inclusive as each occupancy presents its own unique characteristics. However, such factors or combination of such factors may be considered to determine if an occupancy is used or designed as a nightclub, dance hall, discotheque, bar, or for similar entertainment purposes.

- 4) Based upon the evidence provided at the hearing, this establishment currently serves meals on a daily basis. However, in looking at the characteristics as a whole, it also routinely features many of the characteristics of the type of entertainment venue within the scope of s. 26G1/2. Such factors include:
 - a) The establishment provides a bar and bar seating, for the purposes of continuously serving alcoholic beverages to customers. Such service is offered more than one hour after full dinner service is discontinued. Customers have the option of purchasing alcoholic beverages in the establishment whether or not they are ordering a meal.

- b) The activities of the bar area have the ability to expand into the dinning area to accommodate special entertainment activities or increased capacity/density.
 - c) Live musical entertainment is routinely and regularly performed 2 or 3 times per week, by 2 or 3 person bands which provide a wide assortment of music including: Rock, Jazz, Country, Rhythm and Blues and Latin. The bands usually do not begin until 10:00 pm. The entertainment is viewed by both diners and spectators alike who are sitting at the bar or standing up. In reviewing all the testimony and evidence as a whole, the board finds that such musical entertainment is one of the principal customer attractions of this establishment. Based upon the establishment's name, décor and atmosphere, customers expect a musical entertainment establishment in addition to accommodations for dining purposes. The board notes that the establishment' name, "Tempo", suggests a musical connotation. Copies of advertisements and testimony of the parties indicates that the establishment clearly holds itself out as providing significant entertainment features for the purpose of attracting customers. The Appellant stated that customers frequently call the establishment to inquire about planned entertainment appearances. This is an indication that the customer attraction is not limited to food offerings.
 - d) The establishment has been issued an entertainment license for the purpose of providing live entertainment.
 - e) The establishment features late hours of operation and activities beyond those hours and activities typical of an establishment operated as a restaurant.
 - f) The establishment does not have separate occupant capacity limits for the dining area or bar or entertainment areas. Patrons are allowed to congregate in all areas of the establishment during entertainment events, thus creating incidents of high occupant density load in certain areas of the establishment, particularly in aisles and routes of egress.
- 5) The Appellants indicated that this board, in prior decisions, has determined that sprinklers were not required pursuant to s. 26G1/2 in certain establishments that featured combined characteristics of a restaurant, bar or entertainment venue. However, in such limited cases, the Board determined that the facility had either: (1) a clear physical and operational separation between the restaurant and bar or entertainment portions of the facility with separate, legally enforceable capacity limits stated on the Certificate of Inspection for such portions which were under 100 persons (and therefore not subject to s. 26G1/2) or (2) the frequency of the entertainment was not regular or routine but temporary in nature and, therefore, specifically allowed by the law by a special permit issued by the fire department.
- 6) Appellant's position that this establishment is "principally a restaurant" and therefore exempt from the provisions of M.G.L., s. 26G1/2 is without merit. Although the facility currently provides a wide assortment of food items typical of a restaurant, this facility, as currently operated, is clearly designed, used and marketed as an establishment that features characteristics within the scope of M.G.L. c. 148, s. 26G1/2. ½. The statute's use of the modifying words: **"or similar entertainment purposes"**(emphasis added) is significant in this determination. It indicates the

legislative intent not to limit the law's applicability to those buildings considered a nightclub or dancehall in a narrow sense, but to also apply the enhanced fire protection to such buildings that have entertainment characteristics similar thereto.

G) Decision and Order

For the foregoing reasons, this Board **upholds** the Order of the Waltham Fire Department to install sprinkler protection in the subject building in accordance with the provisions of M.G.L. c.148, s.26G½. Sprinkler protection shall be required in all first floor areas of this building only and not in other portions of the building.

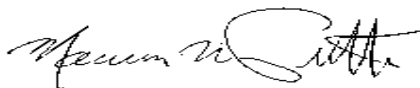
H) Vote of the Board

Maurice Pilette, (Chairperson)	In Favor
Stephen D. Coan, State Fire Marshal	In Favor
Alexander MacLeod	In Favor
Peter E. Gibbons	In Favor

I) Right of Appeal

You are hereby advised that you have the right, pursuant to section 14 of chapter 30A of the General Laws, to appeal this decision, in whole or in part, within thirty (30) days from the date of receipt of this order.

SO ORDERED,



Maurice Pilette, P.E.. Chairman
Chairperson

Dated: August 24, 2006

A COPY OF THIS DECISION AND ORDER WAS FORWARDED BY CERTIFIED MAIL, POSTAGE PREPAID TO:

Robert Mann, Esq.
Harnish, Jenney, Mitchell & Resh
564 Main Street
Waltham, Massachusetts 02452

AND FORWARDED VIA 1st CLASS MAIL, POSTAGE PRE-PAID, TO:

Chief Richard Cardillo
Waltham Fire Department
175 Lexington Street
Waltham, Massachusetts 02452-4638